Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

EDWARD P. DECHERT, as Trustee for the Bankruptcy Estate of Judy A. Oyler,

Petitioner,

v.

THE CADLE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Seventh Circuit reversed the district court's decision awarding Edward P. Dechert ("Dechert"), as Trustee for the bankruptcy of Judy A. Oyler, attorneys' fees and costs pursuant to § 1692k of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), which followed the district court's entry of summary judgment as to liability against the defendant debt collector, The Cadle Company ("Cadle"), and also followed Dechert's decision to waive trial as to the "additional damages" sought in his lawsuit against Cadle, pursuant to § 1692k of the FDCPA. Dechert's decision to waive trial as to damages was done to end extremely protracted litigation in the district court, and because Dechert had already obtained a $1,000 award, as sanctions against Cadle, which award was equivalent to the maximum damages recoverable at trial. Cadle thereafter appealed the fee award decision to the Seventh Circuit. In its appeal, Cadle conceded that the district court's order awarding attorneys' fees and costs to Dechert fully comported with the existing law of the Seventh Circuit at that time. Yet, Cadle questioned whether a fee award was appropriate based on the facts of the case, and asked the Seventh Circuit to overturn existing precedent. Although Cadle did not argue that Dechert was not a "prevailing party," the Seventh Circuit *sua sponte* held that Dechert was not, and reversed the district court's award of attorneys' fees and costs. The Seventh Circuit's decision directly conflicts with decisions of the Second and Third Circuits, as well as its own prior decisions, and also improperly applies this Court's decision in *Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and Human Services*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

One question is presented:

1. Whether a plaintiff is a "prevailing party" under this Court's decision in *Buckhannon*, in an action brought pursuant to the FDCPA, or under other consumer protection, attorney fee-shifting statutes – where summary judgment as to liability was entered against a defendant and where no actual or additional damages were awarded to the plaintiff – and therefore the plaintiff is entitled to recover attorneys' fees and costs, pursuant to §1692k of the FDCPA? *See*, 15 U.S.C. § 1692k, at Appendix E.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Dechert v. Cadle Co.*, 441 F.3d 474 (7th Cir. 2006). The Seventh Circuit reversed the November 10, 2004 decision of the United States District Court for the Southern District of Indiana, reported at *Dechert ex rel. Estate of Oyler v. The Cadle Co.*, 2004 WL 2999112 (S.D.Ind. 2004) (No. IP01-880-C B/G). Dechert's Petition for Rehearing *en banc* was denied by the Seventh Circuit on May 1, 2006. *See*, Appendices A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on March 16, 2006. The Seventh Circuit denied Dechert's Petition for Rehearing *en banc* on May 1, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Fair Debt Collection Practices Act regarding Civil Liability, 15 U.S.C. § 1692k, is lengthy and therefore set out in Appendix E, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

The Seventh Circuit's decision in this matter, reversing an award of attorneys' fees and costs to Plaintiff's counsel, despite their successful litigation of claims under § 1692g of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* ("FDCPA"), conflicts with decisions of the Second and Third Circuits, as well as the Seventh Circuit's own prior decisions, and with this Court's decisions, as to what entitles a litigant to be a "prevailing party" in attorney fee-shifting litigation. Petitioner Edward P. Dechert, as trustee for the bankruptcy estate of Judy A. Oyler ("Dechert"), obtained judgment against Respondent, The Cadle Company ("Cadle"), for violating the FDCPA, *and the equivalent of the maximum amount of damages as a sanction,* but were deemed not to be a prevailing party by the Seventh Circuit. Review by this Honorable Court is necessary to clarify the application of this Court's decision in *Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and Human Services*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), to FDCPA litigation, and litigation under all other private attorney-general, attorney fee-shifting statutes, to reconcile the conflicting decisions of two other Circuit Courts of Appeal, and to secure uniformity in the Seventh Circuit's own decisions.

The underlying claim was whether Cadle's form debt collection letter adequately stated the amount of the debt it was attempting to collect from a consumer. The trial court found that Cadle had violated § 1692g(a)(1) of the FDCPA – holding that the language used in Cadle's form debt collection letter was "nearly identical" to the language that the Seventh Circuit had previously found to violate the FDCPA in *Miller v. McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC*,

214 F.3d 872 (7th Cir. 2000), and granted summary judgment in favor of Petitioner Dechert on September 11, 2003. *See, Dechert v. The Cadle Company*, 2003 WL 23008969 at [*4] (S.D. Ind. 2003), attached herein at Appendix C.

Following its entry of summary judgment in favor of Dechert, on March 24, 2004 the trial court granted, on the eve of trial, Dechert's motion for sanctions, pursuant to Federal Rule of Civil Procedure 37(b), and awarded Dechert $1,000 for Cadle's failure to comply with discovery requests pertaining to the identification of potential witnesses for an upcoming trial on the issue of damages.

On April 19, 2004, Dechert, because he had, in fact, received, via the $1,000 sanctions award, the equivalent of the maximum amount of "additional damages" he could obtain at trial pursuant to § 1692k(a) of the FDCPA, and wishing to bring an end to the litigation, so that the final distribution of the assets of the bankruptcy estate was not further delayed – moved to waive trial on additional damages and to determine the appropriate amount of fees and costs. Cadle did not object to this motion and the trial court granted the motion to waive trial on April 21, 2004.

On November 10, 2004, the trial court awarded Dechert's counsel $58,095.65 in fees and $3,704.65 in costs, and declined to award Cadle sanctions or fees and costs. *See, Dechert v. The Cadle Co.*, 2004 WL 2999112 (S.D.Ind. 2004), attached herein at Appendix B.

Thereafter, Cadle appealed the fee award decision to the Seventh Circuit. In its appeal, Cadle conceded that the district court's order awarding attorneys' fees and costs to Dechert fully comported with the existing law of the Seventh Circuit

at that time. Yet, Cadle questioned whether a fee award is appropriate based on the facts of this case and asked the Seventh Circuit to overturn existing precedent. Although Cadle did not argue that Dechert was not a "prevailing party," the Seventh Circuit *sua sponte* addressed this issue in its opinion. The Seventh Circuit, in purported reliance upon this Court's holding in *Buckhannon*, reversed the district court's decision awarding attorneys' fees and costs, holding that Dechert was not a "prevailing party."

Thus, the decision in this matter means that the Seventh Circuit has interpreted *Buckhannon* to require that an FDCPA plaintiff obtain a monetary award of damages – either actual, or "such additional damages as the court may allow" – in order to be the prevailing party in an FDCPA lawsuit, which is a significant new ruling (*i.e.*, the implications of *Buckhannon* for consumer protection statutes) that the Seventh Circuit had previously left open in *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 667 (7th Cir. 2001) and which conflicts with decisions of the Second and Third Circuits.

REASONS FOR GRANTING THE PETITION

How this Court's decision in *Buckhannon* should be applied to certain consumer protection statutes, namely the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"), and specifically, whether a plaintiff who is wholly successful in achieving summary judgment in his favor – wherein the court found that a defendant debt collector has violated the FDCPA, but where no actual or "additional" damages are awarded to the plaintiff – is a "prevailing party" entitled to recover attorneys' fees and costs, is an important question. *See, Buckhannon Board and Care Home, Inc., v. West Virginia Department of Health and*

Human Services, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). This Court has yet to clarify the application of *Buckhannon* to consumer protection statutes, such as the FDCPA, and the Seventh Circuit's decision to overturn the trial court's award of attorneys' fees and costs conflicts with decisions of the Second and Third Circuits, as well as its own prior decisions regarding both the mandatory nature of awarding attorneys' fees and costs pursuant to the FDCPA, and whether a litigant is a "prevailing party."

The Seventh Circuit's decision conflicts with decisions of the Second and Third Circuits regarding the mandatory nature of an award of attorneys' fees and costs in FDCPA cases regardless of whether monetary damages have been awarded. *See*, *Emanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2nd Cir. 1989), *Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 28 (2nd Cir. 1989), and *Graziano v. Harrison*, 950 F.2d 107, 113 (3rd Cir. 1991). Indeed, the Third Circuit's decision in *Graziano* shows that the Seventh Circuit's decision, reversing the fee award for Dechert, wholly contradicts the purpose of the FDCPA as set out in the statute and in the congressional history, and thus, if allowed to stand, would negatively impact consumers' ability to seek and obtain redress for debt collectors' violations of their rights.

Moreover, The Seventh Circuit's reversal of Dechert's fee award also conflicts with its own prior decisions regarding the mandatory nature of an award of attorneys' fees and costs in FDCPA cases. *See*, *Zagorski v. Midwest Billing Serv., Inc.*, 128 F.3d 1164, 1167 (7th Cir. 1997), *Tolentino v. Friedman*, 46 F.3d 645, 651 (7th Cir. 1995), and *Mace v. Van Ru Credit Corp.*, 109 F.3d 338 (7th Cir. 1997).

Lastly, the Seventh Circuit's decision in this matter conflicts with its prior decisions as to what constitutes a "prevailing party" in *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004), *King v. Illinois State Board of Elections*, 410 F.3d 404 (7th Cir. 2005) and *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 665 (7th Cir. 2001), and further, conflicts with this Court's decision in *Buckhannon*.

Accordingly, the split among the appellate courts in interpreting the FDCPA as to mandatory fee awards for plaintiffs in "successful actions," and the inconsistency in the Seventh Circuit's opinions, require resolution. Left undisturbed, the Seventh Circuit's decision means that it has interpreted *Buckhannon* to require that an FDCPA plaintiff obtain a monetary award of damages – either actual, or "such additional damages as the court may allow" – in order to be the prevailing party in an FDCPA lawsuit, which is wholly inconsistent with the purpose of the FDCPA and precedent.

I. Review is warranted to resolve a conflict between the Circuits – regarding the mandatory nature of attorney fee awards under the FDCPA and other fee-shifting consumer protection statutes – and the Seventh Circuit's decision in this matter, and to ensure consumers are able to vindicate their rights under the FDCPA

Section 1692k(a)(3) of the FDCPA permits a plaintiff "in the case of any successful action" to recover "the costs of the action, together with a reasonable attorney's fee as determined by the court." *See*, 15 U.S.C. § 1692k(a) at Appendix E. The Second Circuit in *Emanuel* and *Pipiles* and the Third Circuit in *Graziano*, have held that an award of

attorneys' fees and costs is wholly consistent with the purpose of the FDCPA – a private attorney-general statute – and thus, is mandatory for a plaintiff who has proven a violation of the FDCPA. *See*, *Graziano*, 950 F.2d at 113; *Emanuel*, 870 F.2d at 809; and *Pipiles*, 886 F.2d 22, 28 (even in the case where no actual or additional damages are awarded, attorneys' fees and costs are mandatory for a plaintiff who has proven a violation of the FDCPA).

Moreover, in *Graziano*, the Third Circuit emphasized the importance of attorney fee awards in comporting with the purpose of the FDCPA. In fact, the Seventh Circuit has long held that attorneys' fees and costs are mandatory in FDCPA litigation. *See*, *Zagorski*, 128 F.3d at 1167, *Tolentino*, 46 F.3d at 651, and *Mace*, 109 F.3d at 344-345.

A. The Seventh Circuit's reversal of the attorney fee award contradicts precedent of the Second and Third Circuits, as well as the Seventh Circuit, regarding the mandatory nature of fee awards in FDCPA cases

Significantly, in *Emanuel* – a case procedurally almost identical to *Dechert* – the Second Circuit properly held that, although the plaintiff was not entitled to recover any actual or "additional" damages for defendant's violation of the FDCPA, the plaintiff was nonetheless entitled to recover attorneys' fees and costs because he had proved he was entitled to summary judgment on his claim under § 1692e(11) of the FDCPA. *See*, *Emanuel*, 870 F.2d 805. In *Emanuel*, the plaintiff did not seek actual damages, but rather, as did Dechert, sought $1,000 — the maximum in "additional" damages permitted by the statute. In holding that *Emanuel*

was not entitled to any "additional" damages, the Second Circuit stated that:

> Considering the nature of [the debt collector's] noncompliance with the statute and the fact that its noncompliance was neither frequent, persistent nor intentional, id. § 1692k(b)(1), we also think that Emanuel should not receive any "additional" damages, particularly since such damages are discretionary, id. § 1692k(a)(2)(A), and no actual damages have been demonstrated.

Emanuel, 870 F.2d 805, 809. The Second Circuit did state, "however, *Emanuel* should be awarded costs and attorneys' fees; the statute mandates such an award 'in the case of any successful action,'" *see*, *Emanuel*, 870 F.2d 805, 809.

Moreover, in construing § 1692k(a)(1) of the FDCPA as to actual damages, and § 1692k(a)(2)(A), which permits "such additional damages as the court may allow, but not exceeding $1,000," in *Pipiles*, the Second Circuit denied actual damages to the plaintiff for failing to establish any injury, and likewise declined to award any "additional" damages because the defendant debt collector "did not intend to deceive or harass Pipiles, and there is no contention that the [debt collector] has frequently or persistently violated the Act." *Pipiles*, 886 F.2d 22, 28. Nonetheless, the court held that "because the FDCPA was violated, however, the statute requires the award of costs and a reasonable attorney's fee." *Pipiles*, 886 F.2d 22, 28. Both *Pipiles* and *Emanuel* illustrate the proper approach to be taken regarding mandatory attorney fee awards for successful FDCPA plaintiffs, especially regarding a plaintiff, such as Dechert, who has successfully proved the defendant's liability under

the FDCPA and received the equivalent of the maximum amount of damages.

In reversing the trial court's award of attorneys fees and costs to Dechert, the Seventh Circuit stated that, although none of the cases it cited arose under the FDCPA, "[W]e cannot find a case under that Act in which the issue is discussed, though plenty of cases under it assume that only a prevailing party is entitled to an award of attorneys' fees and costs." *Dechert v. Cadle Company*, 441 F.3d 474, 476 (7th Cir. 2006). The Seventh Circuit has consistently held that fee awards are mandatory in FDCPA cases. *See, Zagorski*, 128 F.3d at 1167, *Tolentino*, 46 F.3d at 651, and *Mace*, 109 F.3d at 344-345.

In its decision in this matter, the Seventh Circuit cited the Eleventh Circuit's decision in *Nagle v. Experian Information Solutions, Inc.*, 297 F.3d 1305 (11th Cir. 2002), in which the Eleventh Circuit reversed an award of attorneys' fees and costs to a consumer who had obtained judgment as to liability for a negligent violation of the FCRA, but received no actual damages – which were the only damages available for a negligent violation of the statute. In contrast, the FDCPA provides not only for "actual" damages, but also "such additional damages as the court may allow, but not exceeding $1,000," *see*, 15 U.S.C. § 1692k(a)(1); 15 U.S.C. § 1692k(a)(2)(A). Construing the text of the FCRA, the Eleventh Circuit in *Nagle* held that the plaintiff was not "successful." *Nagle*, however, contradicts the Seventh Circuit's rulings in *Zagorski*, *Tolentino*, and *Mace*.

In *Zagorski*, the Seventh Circuit noted that it had previously held in *Tolentino* and *Mace*, that "the award of attorneys' fees to plaintiffs for a debt collector's violation of

any provision of the FDCPA is mandatory," *Zagorski*, 128 F.3d 1164, 1166. Moreover, in *Zagorski*, the court explained that when district courts calculate a fee award, "the most critical factor in determining the reasonableness of the award is the degree of success obtained," which "success must be measured not only in the amount of the recovery but also in terms of the principle established and the harm checked." *See*, *Zagorski*, 128 F.3d 1164, 1166-67. Accordingly, although the amount of attorney's fees awarded may be adjusted by the court, an award is nonetheless mandatory. Thus, in *Dechert*, it was in the court's discretion to adjust the fee award (S.D. Ind. November 10, 2004 Order at App. B), but because Cadle was found to have violated the FDCPA, it was improper for the Seventh Circuit to reverse the fee award outright.

B. The Seventh Circuit's reversal of the attorney fee award in this matter contradicts the unequivocal purpose of the FDCPA

In *Graziano*, the Third Circuit reversed the trial court's denial of attorneys' fees and costs to a plaintiff who had proved that the defendant debt collector violated the FDCPA and was entitled to summary judgment. The Third Circuit stated that "given the structure of the section [§ 1692k(a)] attorney's fees should not be construed as a special or discretionary remedy; rather the Act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorneys general." *See*, *Graziano*, 950 F.2d 107, 113. In fact the Third Circuit, citing the Second Circuit's decisions in *Emanuel* and *Pipiles*, went on to say:

> Cases interpreting [§ 1692k(b)] have made clear that in the instance of a single trivial, and

> unintentional violation of the Act, it is within the court's discretion to decline to award statutory damages at all . . . however, section § 1692k contains no parallel language directing the court to consider particular factors in determining a reasonable attorney's fee.

Graziano, 950 F.2d 107, 113-14. Thus, although a court must determine the amount of a reasonable fee award in a particular FDCPA case in accordance with the substantial Supreme Court precedent pertaining to calculation of a reasonable attorney fee award, as long as the plaintiff is successful, a fee award is mandatory. *Graziano*, 950 F.2d 107, 113-14. "Only in unusual circumstances, however, may the court decline to award a fee. . . ," such as in the presence of bad faith. *Graziano*, 950 F.2d 107, 114. The Seventh Circuit's decision reversing the attorney fee award to Dechert, because he had not recovered any actual or "additional" damages for Cadle's explicit violation of the law, is wholly contrary to the language of § 1692k and the purpose of the FDCPA – to allow consumers to act as private attorneys general to vindicate their rights. If the Seventh Circuit's decision stands, consumers may be unable to pursue violations of the FDCPA at the risk that if the trial court should, in its discretion, award no "additional" damages for the violation, then the consumer would be precluded from recovering fees and costs for the expense of litigation on their behalf.

Accordingly, review by this Court is necessary to reconcile *Buckhannon* with the foregoing decisions of the Second, Third and Seventh Circuits, regarding the mandatory nature of fee awards in successful FDCPA actions.

II. Review is necessary to resolve a conflict among the Circuits regarding what constitutes a "prevailing party" under *Buckhannon* as applied to the FDCPA

Although the Seventh Circuit purported to rely on this Court's decision in *Buckhannon*, the holding in *Buckhannon* is not entirely controlling on the issue presented here: whether a plaintiff who has proved that the defendant violated the FDCPA must be awarded monetary damages in order to be a "prevailing party" entitled to recover attorneys' fees and costs in a successful FDCPA action.

Specifically, in *Buckhannon*, the party seeking an award of attorneys' fees – for alleged violations of the Fair Housing Amendments Act and the Americans with Disabilities Act – never secured a judgment on the merits, nor any kind of consent decree; rather, its case had been dismissed as moot after the state legislature changed the disputed law, and prior to any substantive judicial determinations. *Buckhannon*, 532 U.S. at 601-602. Moreover, the plaintiff in *Buckhannon* sought prevailing party status under the "catalyst theory" – *i.e.*, that a party achieved a desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *Buckhannon*, 532 U.S. at 601.

In rejecting the "catalyst theory", this Court stated that ". . . a 'prevailing party' is one who has been awarded some relief by the court . . ." and that "[O]ur precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605 (emphasis in original).

Unlike the plaintiff in *Buckhannon*, Dechert did not advance a "catalyst" theory – he won his case on the merits. The trial court properly granted summary judgment in favor of Dechert for Cadle's violation of § 1692g(a)(1) of the FDCPA – holding that the language used in Cadle's form debt collection letter was "nearly identical" to the language that the Seventh Circuit had found to violate the FDCPA in *Miller v. McCalla*. *See*, *Dechert*, 2003 WL 23008969 at [*4]; at Appendix C. Thus, Dechert brought a successful action to enforce the FDCPA – he was granted a judgment on the merits of his claim, and the trial court correctly awarded Dechert attorneys' fees and costs.

More importantly, here, there was a "corresponding alteration in the legal relationship of the parties" – Cadle was found to have violated the FDCPA and Dechert obtained summary judgment on the merits of his claim. This judgment could be used by Dechert, other consumers, or the Federal Trade Commission to obtain damages against Cadle, should it continue to use the same form debt collection letter found to have violated § 1692g(a)(1) of the FDCPA. Moreover, under the approach taken in *Emanuel* and *Pipiles*, if Dechert had proceeded to trial on the issue of "additional" damages, but the district court awarded no such damages, Dechert still would have been rightfully entitled to recover attorneys' fees and costs because he had successfully proved that Cadle had violated the FDCPA.

The Seventh Circuit, nonetheless reversed the trial court's award of attorney's fees and costs to Dechert because Dechert had waived trial on the issue of damages and thus did not obtain monetary relief in the form of actual damages (which Dechert never alleged) or "additional" damages (which Dechert did seek), that may be awarded in the trial court's discretion for violations of the FDCPA. *See*, Appendix E.

In *Palmetto Properties*, the Seventh Circuit upheld an award of attorneys' fees and costs to a party who had obtained partial summary judgment as to the unconstitutionality of a county ordinance relating to the location of a strip club, *i.e.*, the trial court made a substantive determination as to the constitutional claim, after which the county repealed the ordinance and the case was dismissed as moot. *Palmetto Properties*, 375 F.3d at 550-551. Here, as in *Palmetto Properties*, the summary judgment order changed the legal relationship of the parties, entitling Dechert to obtain damages from Cadle, even though no actual or statutory damages were awarded, other than the $1,000 equivalent sanction award for Cadle's discovery abuses.

Likewise, in *King*, the Seventh Circuit found that parties who intervened in a civil rights' and voting rights' lawsuit to defend a map of congressional districts were "prevailing parties" in a lawsuit because the intervenors achieved the benefit they sought when they intervened in the action – preservation of a particular district in a map of congressional districts. *King*, 410 F.3d 414-415. Here, Dechert obtained the relief he originally sought – declaration that the form of Cadle's debt collection letter violated the FDCPA.

In contrast, in *Crabill*, the plaintiff lost his claim under the Fair Credit Reporting Act. *Crabill*, 259 F.3d at 663. As the Seventh Circuit noted in *Crabill*, in light of the *Buckhannon* decision, to be deemed a prevailing party, at least under civil rights' statutes, a party must "obtain formal judicial relief", not merely "success"; *Crabill*, however, left the determination of the application of *Buckhannon* in consumer protection statues for consideration in future cases. *Crabill*, 259 F.3d at 667. Here, unlike the plaintiff in *Crabill*, Dechert did, in fact, obtain "formal judicial relief" – he was

granted summary judgment on the merits of his claim and established Cadle's liability for its violation of the FDCPA.

Thus, although Dechert's appeal accorded the Seventh Circuit the opportunity to address the application of *Buckhannon* to fee-shifting consumer protection statutes, such as the FDCPA and the FCRA, the Seventh Circuit improperly disregarded its own prior decisions regarding prevailing party status and misapplied *Buckhannon*. Accordingly, review by the Supreme Court is necessary to clarify the boundaries of *Buckhannon* in terms of a plaintiff who has won summary judgment in his favor with regard to his FDCPA claims (or claims under any other fee-shifting, consumer protection statute), yet who has not been awarded monetary damages.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully asks this Honorable Court to hear this appeal, pursuant to United States Supreme Court Rule 10(a).

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND AMENDED JUDGMENT — WITHOUT ORAL ARGUMENT — OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 16, 2006

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-4213, 05-1359

EDWARD P. DECHERT, as trustee of the estate in bankruptcy of Judy A. Oyler,

Plaintiff-Appellee,

v.

CADLE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. IP01-0880-C-B/G—**Sarah Evans Barker**, *Judge.*

SUBMITTED FEBRUARY 15, 2006—DECIDED MARCH 16, 2006

Before BAUER, POSNER, and COFFEY, *Circuit Judges.*

Appendix A

POSNER, *Circuit Judge.* The main appeal challenges an award of attorneys' fees in a protracted suit under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* An earlier stage of the litigation occupied us in *Dechert v. Cadle Co.*, 333 F.3d 801 (7th Cir. 2003). For present purposes, the only things worth noting are that the plaintiff sought, by way of relief for the alleged violation of the Act, only statutory damages of $1,000; that after obtaining $1,000 in compensation for the defendant's failure to comply with a discovery order he abandoned his claim for statutory damages; but that the district court nevertheless awarded the plaintiff almost $60,000 in attorneys' fees and court costs.

The plaintiff was entitled to an award of fees and costs only if his siut could be characterized as a "successful action to enforce the foregoing liability," 15 U.S.C. § 1692k(a)(3), meaning liability for either actual or statutory damages. The general, indeed all but invariable, rule is that to be a prevailing party and therefore entitled to an award of fees and costs, you either must obtain a judgment that provides you with formal relief, such as damages, an injunction, or a declaration that you can use if necessary to obtain an injunction or damages later, or must obtain a settlement that gives you similar relief. *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001); *King v. Illinois State Board of Elections*, 410 F.3d 404, 414 (7th Cir. 2005); *Palmetto Properties, Inc. v. County of DuPage*, 375 F.3d 542, 547 (7th Cir. 2004); *Crabill v. Trans Union, L.L.C.*, 259 F.3d 662, 666-67 (7th Cir. 2001); *Nagle v. Experian Information Solutions, Inc.*, 297 F.3d 1305 (11th Cir. 2002). The plaintiff obtained neither. The $1,000 he received because of the defendant's

violation of a discovery order did not enforce any liability under the Fair Debt Collection Practices Act.

In *Buckhannon* the Supreme Court rejected the "catalyst" theory, whereby a lawsuit that did not eventuate in any formal relief or settlement could be deemed "successful" if it prompted the defendant to change his ways. This lawsuit, so far as appears, had not even that effect.

Now it is true that none of the cases we have cited arose under the Fair Debt Collection Practices Act. We cannot find a case under that Act in which the issue is discussed, though plenty of cases under it assume that only a prevailing party is entitled to an award of attorneys' fees and costs. E.g., *Zagorski v. Midwest Billing Services, Inc.*, 128 F.3d 1164, 1166 (7th Cir. 1997) (per curiam). The assumption is sound. As we noted in the *Palmetto* case, *supra*, 375 F.3d at 547, the Supreme Court has "encouraged consistent interpretation" of federal fee-shifting provisions, "across the federal statutes," as allowing an award of attorneys' fees and costs only to a prevailing party. There is nothing to rebut the presumption—which we have called "conclusive . . . absent a clearly contrary indication," *id.*—in a case under the Fair Debt Collection Practices Act. There is no ambiguity in "successful action to enforce . . . liability" for actual or statutory damages. Both *Crabill* and *Nagle* concluded, with respect to the materially identical language in the Fair Credit Reporting Act ("successful action to enforce any liability under this section," 15 U.S.C. § 1681o(a)(2)), that a "successful action" is indeed one in which the plaintiff was a prevailing party within the meaning that *Buckhannon* and the other decisions that we have cited assign to that term.

Appendix A

The defendant has not argued directly that the plaintiff was not a prevailing party in this litigation. But it argues that the plaintiff should receive a zero award of attorneys' fees and costs because the suit accomplished nothing, and that is close enough to preserve the issue, which is anyway a pure, undebatable issue of law. We occasionally consider such issues even when they were not presented to the district judge. *Niedert v. Rieger*, 200 F.3d 522 (7th Cir. 1999); *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996); *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir. 1993).

The defendant's cross-appeal asks us to impose sanctions on the plaintiff for bringing this suit in bad faith. The denial of attorneys' fees and costs is sanction enough.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT – WITHOUT ORAL ARGUMENT

Date: March 16, 2006

BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

Honorable RICHARD A. POSNER, Circuit Judge

Honorable JOHN L. COFFEY, Circuit Judge

Nos. 04-4213 & 05-1359

EDWARD P. DECHERT, Trustee for
the Estate of Judy A. Oyler,

Plaintiff - Appellee

v.

CADLE COMPANY, an Ohio corporation,

Defendant - Appellant

Appeals from the United States District Court for the
Southern District of Indiana, Indianapolis Division
No. 01 C 880, Sarah Evans Barker, Judge

Appendix A

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

(1060-110393)

APPENDIX B — ENTRY ON PLAINTIFF'S FEE REQUEST AND DEFENDANT'S MOTION FOR FEES AND SANCTIONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION WITH JUDGMENT DATED NOVEMBER 10, 2004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP01-880-C(B/G)

EDWARD DECHERT, BANKRUPTCY TRUSTEE FOR THE ESTATE OF JUDY A. OYLER,

Plaintiff,

vs.

THE CADLE COMPANY, an Ohio Corporation,

Defendant.

ENTRY ON PLAINTIFF'S FEE REQUEST AND DEFENDANT'S MOTION FOR FEES AND SANCTIONS

This bitter battle waged under the Fair Debt Collection Practices Act ("FDCPA") is finally coming to an end (we hope). After a trip to the Seventh Circuit, which resulted in a reversal of our earlier grant of class certification, Plaintiff

has received summary judgment on liability, an award of $1,000 as sanctions against Defendant and has waived trial on the issue of statutory "additional damages," under 15 U.S.C. § 1692k(2)(A). Since all the substantive issues have now been resolved, Plaintiff seeks an award of its attorney fees, in accordance with 15 U.S.C. § 1692k(3). In what has become the expected course of action in this case, the Defendant, not to be outdone, also seeks an award of attorney fees as a sanction against the Plaintiff and his attorneys, pursuant to 28 U.S.C. § 1927.

BACKGROUND

Plaintiff is the Trustee of the bankruptcy estate of Judy Oyler. In September of 2003, we ruled in favor of the Trustee on the issue of liability, finding that Defendant, The Cadle Company ("Cadle"), a debt servicing and collection corporation, sent a dunning letter to Judy Oyler which did not comply with the FDCPA. We have previously set forth in detail the factual and procedural background of this matter on a number of occasions. Our entries of September 12, 2003 and December 9, 2003 provide this detailed description of the events leading to and culminating in this litigation, but we include the following brief summary to set the stage for our final rulings.

This case was originally filed on behalf of Judy Oyler and all others similarly situated in June of 2001, a little more than a month after Oyler received a discharge from bankruptcy. However, because Oyler never listed her FDCPA claims as an asset in bankruptcy, it became necessary for the Trustee to reopen the bankruptcy estate so that this action

could be prosecuted by the estate. All that took a while, however, since it was not until March 4, 2002 that the Trustee was substituted as the real party in interest.

During the time the issue of who owned the Oyler FDCPA claim was being resolved, class certification also had to be decided. Class certification had been sought and the issue fully briefed prior to the substitution of the Trustee as the named Plaintiff. Cadle sought dismissal of the Complaint during that time period. Four weeks after the Trustee was named as Plaintiff and Cadle's effort to have the matter dismissed was defeated, we granted class certification, with the Trustee serving as the class representative. As previously noted, that class certification decision was appealed to the Seventh Circuit which reversed our decision and returned the case as an individual matter for us to resolve the pending motion for summary judgment on the issue of liability. We then granted the summary judgment motion in favor of the Trustee. Since no actual damages or additional damages are sought by Plaintiff, we now turn to what we (perhaps overly optimistically) regard as the concluding issue of attorney fees.

CADLE'S MOTION FOR FEES & SANCTIONS

Before we parse the fee request filed by Plaintiff as the prevailing party, we address the unique, but in the context of this case not surprising request by Defendant for an award of its fees and an additional award as sanctions against Plaintiff. Defendant Cadle asserts that it should receive reimbursement of its attorney fees because: 1) counsel for Oyler and the Trustee knew of Oyler's bankruptcy prior to initially filing the complaint and nonetheless waited until

after Oyler's discharge to file this action in her personal capacity rather than in the name of the estate, in hopes of avoiding a proper party in interest controversy, given that Oyler had omitted this claim as an asset of her estate; 2) Cadle was forced to expend a substantial sum in attorneys fees in opposing class certification on appeal before the Seventh Circuit; and 3) Cadle was required to defend against unsuccessful sanctions motions filed by Plaintiff, as well as[1] numerous discovery disputes.

Cadle provides us with no rationale or authority under the FDCPA for awarding it such a recovery. Our research, and it didn't require much, discloses that there is none. No provision of the FDCPA and no federal common law bases authorize such an award. Accordingly, we deny Cadle's request for attorney fees.

As uncomplicated as that decision was, however, one aspect of Cadle's request for sanctions under 28 U.S.C. § 1927 does give us pause. As Cadle correctly notes, the billing records submitted by Plaintiff's counsel demonstrate that he was well aware of Oyler's ongoing bankruptcy at least three months prior to her discharge which was the time period during which Plaintiff's counsel was investigating the FDCPA claim in anticipation of filing the Complaint. Further, the records clearly indicate that, prior to filing this case, Plaintiff's attorneys discussed among themselves the fact of Oyler's bankruptcy and the need to amend the bankruptcy petition (which we take to mean that they planned to bring

1. Cadle fails to mention that it also unsuccessfully defended against two other motions for sanctions.

the claim to the attention of the court or Trustee at some point). For some reason, though, they proceeded with the filing of a complaint on behalf of Oyler, instead of allowing the action to be brought by the bankruptcy estate.

While we do not view this as a basis to award Cadle its attorney fees, nor do we regard it as a vexatious multiplication of proceedings capable of invoking the discretionary "sanction" provisions of 28 U.S.C. § 1927 against Plaintiff's legal counsel,[2] we nevertheless are persuaded that counsel for Plaintiff should not benefit from that initial decision to pursue the claim on behalf of Oyler, personally. While the court has no way of knowing whether it was a strategic choice or an uninformed one, all that counsel had to do was check their client's asset declaration in the bankruptcy to know that the case should not have been brought in her name and that it was necessary to reopen the bankruptcy estate. That was not done until the real party in interest issue was raised in the course of the class certification debate, months after the complaint was filed.

Therefore, though the Plaintiff prevailed on the issue of liability, there will be no award of attorney fees for time spent

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2. 28 U.S.C. § 1927 provides:

§ 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably or vexatiously, may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

prior to the Trustee's substitution as counsel. Clearly, it is the Trustee who is the prevailing party, not Oyler individually. As a non-prevailing dismissed party, and one with no personal stake, she and her individual counsel are not entitled to any of the fees she may have incurred.[3]

Award of Attorney Fees

Having imposed this limit on the award of attorney fees to the Trustee, we turn to address the specifics of what fees, if any, should be included. A successful FDCPA claimant is entitled to recover "the costs of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1692k(a)(3). The Supreme Court has defined a reasonable attorney's fee as "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This calculation, known as the "lodestar," is then subject to upward or downward adjustments based on a variety of factors. *Mathur v. Board of Trustees of Southern Illinois University*, 317 F.3d 738, 742 (7th Cir. 2003).

It is up to the successful plaintiff to prove that both the hourly rate and the number of hours claimed are reasonable. *Hensley*, 461 U.S. at 433. While the court has considerable discretion in fixing the amount of any award, we are required to explain any departures from the rates and hours sought by

3. Similarly, no fees are sought by Plaintiff and thus none shall be paid for defending against Defendant's appeal of the class certification decision, which issue Plaintiff lost before the Court of Appeals.

the Plaintiff. *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 90 F.3d 1307, 1314 (7th Cir. 1996).

In analyzing the hourly rates sought by the attorneys for the Trustee to determine if they are reasonable, we examine the "market rate" for lawyers of similar ability and experience in the community for the same or similar type work. *Tolentino v. Friedman*, 46 F.3d 645, 652-653 (7th Cir. 1995). This approach helps to ensure that attorneys will be willing to take on fee-shifting cases, rather than limiting their services only to those who pay up front. *Id.* Attorneys for the prevailing party must establish the market rate. *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 554 (7th Cir. 1999).

Here, attorneys for the Trustee seek an hourly rate of $300 for David J. Philipps. Mr. Philipps has been a practicing attorney since 1988 and is a name partner in the Chicago law firm of Gomolinski & Philipps, Ltd., whose practice focuses on the FDCPA and other consumer advocacy laws. The attorneys assigned the rate of $250 per hour for Mary E. Philipps, an associate with the same firm, who received her law degree in 1987 and whose practice is described as being nearly identical to that of Mr. Philipps. Local Indianapolis counsel, Steven J. Halbert, also graduated law school in 1987 and has devoted a significant part of his practice to FDCPA matters. For Mr. Halbert's time, a rate of $220 per hour is sought.

The supporting affidavits submitted by Mr. Philipps and Mr. Halbert state that all three hourly rates are their customary rates for the type of work they performed. In addition to their

own affidavits, they submitted the affidavit of attorney Samuel Hodson, a 1986 law graduate and a member of the Indianapolis firm of Kroger Gardis & Regas. Mr. Hodson avers his usual and customary rate is $240 per hour and, further, in his opinion the rates sought by counsel for the Trustee are well within the range of fees reasonably and customarily charged for consumer protection fee-shifting cases. Cadle has submitted the opposing affidavit of another Indianapolis attorney, Franklin Miroff, who has practiced law for 40 years and is currently a senior partner with the firm of Miroff Cross & Woolsey. He opines that $175 is a reasonable rate in the Indianapolis area for the type of work involved in this case.

We first note that the "community" for which we calculate the market rate is the situs of the litigation, not the community where the attorney or his firm may be located. *Davis County Solid Waste Management and Energy Recovery Special Service Dist. v. U.S. Enviornmental Protection Agency*, 169 F.3d 755, 757-758 (D.C.Cir. 1999). Only if no qualified attorneys are available in the local community or if no local attorneys are willing to accept the work is it appropriate to determine a market rate other than that which prevails where the case is brought. *Id.* Thus, whatever David and Mary Philipps might command for their work in Chicago has less significance in terms of discerning the market rate for their work in the Indianapolis legal community.

The most persuasive evidence before us, with regard to the market rate for handling FDCPA cases in this legal community, is the rate obtained by Mr. Halbert, which is $220

per hour. Mr. Halbert apparently was a classmate of Mr. Philipps in law school and has had a similar practice to that of his Chicago colleagues. We surmise that if Mr. Philipps were located in the Indianapolis area, he would likely command a similar rate to what Mr. Halbert receives. Even Mr. Hodson, an Indianapolis attorney with a much larger firm offering a wider array of services and thus incurring greater overhead than either Mr. Philipps's firm or Mr. Halbert's, does not command the $300-per-hour fee that Mr. Philipps seeks or the $250 per hour fee his associate apparently commands in Chicago.

Accordingly, we find that the appropriate market rate for Mr. Philipps and Mr. Halbert is $220 per hour. While no evidence of record directly addresses the Indianapolis market rate for an associate attorney such as Ms. Philipps, Mr. Miroff's affidavit suggests that given the type of legal work involved, without differentiating between experience levels, an hourly rate of about $175 is applicable to this market. In view of Mr. Miroff's affidavit and in light of our own experience, we view $175 per hour to be the appropriate market rate for Ms. Philipps's services.

On the basis of these hourly rates for the attorneys involved, we next determine the number of hours reasonably spent by these attorneys in prosecuting this claim. Again, the burden in establishing the reasonableness of their efforts is on the Plaintiff. *Hensley*, 461 U.S. at 433. The Trustee has submitted billing statements from Mr. Philipps's firm and the time entries, with brief descriptions, from Mr. Halbert. Plaintiff seeks a total of $101,636.15 in attorney fees and

costs.[4] As previously noted in Footnote 3, *supra*, this amount does not include any attorney fees generated for work exclusively devoted to the issue of class certification, as Plaintiff has excluded those fees in view of his loss at the Seventh Circuit. Also, as previously discussed, we have sustained Cadle's objection to fees for any time devoted to the case prior to the substitution of the Trustee as the Plaintiff. The affidavit of Mr. Miroff, submitted by Cadle, also includes his opinion that the time spent on this matter was "more substantial than one would reasonably expect for litigation dealing with a strict liability federal statute."

Again, as previously determined, the failure of Plaintiff's counsel to bring suit in the name of the real party in interest, well knowing who the real party in interest was and requiring Defendant to file a dismissal motion on that basis prompts the court to disallow any fees to be awarded for time expended prior to March 4, 2002, which was the date on which the Trustee was substituted in as Plaintiff. Costs, other than the costs of filing suit, incurred during that period prior to substitution are also unrecoverable. Thus, in multiplying the hours of work performed subsequent to March 3, 2002 by the market rates we have established, the aggregate attorney fee total is $63,323 with the following amounts attributable to each attorney:

Mary Philipps	28.2 hrs. @ $175.00	$ 4,935.00
David Philipps	201.1hrs. @ $220.00	44,242.00
Steve Halbert	64.3 hrs. @ $220.00	14,146.00
		$63,323.00

4. This figure is computed using the hourly rates sought by the Plaintiff, not the adjusted hourly rates which we have determined to be appropriate.

Appendix B

Costs after deductions for pre-March 2002 expenditures equal $3,704.65.

Any hours not reasonably necessary must be deducted in establishing the lodestar, because the lodestar is the presumptively reasonable fee amount. *Hensley*, 461 U.S. at 433. Intending in no way to discourage the retention of local counsel by attorneys who do not normally practice in this district, it is nonetheless fair to note that a degree of overlap and duplication in the work results from this arrangement. If there were an absence of qualified FDCPA litigators in Indianapolis or if this particular case were extraordinarily complicated, a need might exist for more than one "partner level" attorney to attend conferences and help develop the litigation strategy. However, given that this was a matter arising under a strict liability statute and given that there are an ample number of local practitioners well versed and experienced in the FDCPA and consumer law arena, we see no need for duplicated efforts, including multiple attorney attendance at hearings and conferences before the magistrates and this court and joint attendance at depositions.

This conclusion dictates a reduction in the hours attributable to Mr. Philipps's travel and attendance (in person or by telephone) at the hearings or conferences which occurred on April 22, 2002, July 16, 2002, August 29, 2002, January 27, 2003 and September 17, 2003. Similarly, we shall disallow the time spent by Mr. Halbert at the deposition of the Trustee because Mr. Philipps also attended the deposition. We will also disregard the entry of 7.3 hours on July 16, 2002 wherein Mr. Halbert indicates he prepared for and attended a hearing, because he also set forth a duplicate entry earlier in his submission for the same work on the same date indicating he

spent 5.2 hours.[5] Thus, we are deducting a total of 40.6 hours of unnecessary duplication of effort and time, figured at $220 per hour and amounting to $8,932, from the previous subtotal of $63,323, yielding a revised lodestar figure of $54,391.[6]

Plaintiff has not argued for any favorable enhancement of the lodestar, and we find no basis for such an enhancement. Though some of Cadle's nettlesome tactics and marginal theories might be taken as a basis for an upward adjustment of the lodestar figure, we find them generally offset by other valid arguments for a downward adjustment not otherwise folded into a monetary computation. Thus, we are satisfied that we have reached a presumptively reasonable fee. On this basis, we award to Plaintiff costs in the amount of $3,704.65 and attorney fees in the total amount of $54, 391, and a final judgment will be entered to reflect these amounts.

It is so ORDERED this 10th day of November, 2004.

s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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5. Mr. Halbert's fee submission listing time entries appears to be a chronological list of work performed, but it is riddled with typographical errors or transposed numbers (especially on some of the early entries on the first page) which make it difficult to be certain what dates some work was performed. In eliminating work performed prior to the Trustee becoming the party plaintiff, we did not include any entry on the first page of the Halbert submission, thus starting with the mid-page entry on page two, for 3/9/02.

6. $63,323 = post 3/3/02 time submitted
$ 8,932 = duplication of effort
$54,391 = lodestar

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP01-880-C-B/G

EDWARD DECHERT, BANKRUPTCY TRUSTEE FOR THE ESTATE OF JUDY A. OYLER,

Plaintiff,

vs.

THE CADLE COMPANY, an Ohio Corporation,

Defendant.

JUDGMENT

The court, having earlier found in favor of the Plaintiff on the issue of liability and on this day having entered an award for the costs and attorney fees reasonably incurred in the prosecution of the action.

IT IS THEREFORE ADJUDGED that judgment be and the same is HEREBY entered in Plaintiff's favor and against Defendant in the amount of Fifty-eight Thousand Ninety-five Dollars and Sixty-five cents ($58,095.65) plus costs in the amount of Three Thousand Seven Hundred Four Dollars and Sixty-five cents ($3,704.65).

Appendix B

IT IS SO ORDERED this 10th day of November, 2004.

s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C — ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION DATED SEPTEMBER 11, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAUSE NO. IP01-880-C(B/G)

EDWARD DECHERT, BANKRUPTCY TRUSTEE SUBSTITUTED FOR JUDY A. OYLER INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

vs.

THE CADLE COMPANY, an Ohio Corporation,

Defendant.

ENTRY

Plaintiff in this matter is the Trustee of an individual bankrupt estate. So it is not surprising that the substance of the complaint is related to a debt. The Trustee claims that The Cadle Company, a debt servicing and collection corporation, sent a dunning letter to the debtor which did not comply with the Fair Debt Collection Practices Act,

15 U.S.C. § 1692 *et. seq.* ("FDCPA").[1] Specifically, plaintiff claims that the letter failed to provide the recipient with the full amount of the debt as required under 15 U.S.C. § 1692g(a)(1). The Trustee also asserts that a notice accompanying the letter which requests confirmation of the amount of the debt or that The Cadle Company be notified of any disagreement with the amount of the debt also violates the FDCPA.

The Trustee has filed a summary judgment motion, attaching the dunning letter and notice, an affidavit of receipt from the debtor and the sworn deposition testimony of Daniel Cadle, the president of the defendant corporation. The motion is straightforward. Trustee relies on *Miller v. McCalla, Raymer. Padrick. Cobb. Nichols & Clark*, LLC, 214 F.3d 872 (7th Cir. 2000) as precedent for finding a violation of the FDCPA where a debt collection letter sets forth the principal balance as the amount due, but adds a notation that additional interest and late charges are not included, but can be determined by placing a phone call to the author of the letter. The Cadle Company responds by maintaining that it was not acting as a "debt collector" as that term is defined in the FDCPA when it sent the letter at issue, the letter does not

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1. The Trustee's complaint alleges that the defendant sent numerous similar violative letters and asks for certification of a class of plaintiffs with the Trustee as class representative. That certification was granted; however, on appeal our Circuit Court opined on the previously unanswered appellate question of whether the Trustee of a bankruptcy estate can be an appropriate class representative. *Dechert v. The Cadle Company*, 333 F.3d 801 (7th Cir. 2003). The answer was no, and upon remand this case now involves the Trustee alone as the named plaintiff.

violate the FDCPA and that there is a factual dispute with regard to whether or not the debt at issue was a "consumer debt" as required for the FDCPA to apply. As a fall back position, defendant asserts the bona fide error defense.

UNDISPUTED MATERIAL FACTS

In July of 2000, an affiliate of The Cadle Company acquired the rights of First Select, Inc. in certain delinquent credit card accounts and related receivables. One of those delinquent accounts belonged to Judy Oyler. On September 18, 2000, The Cadle Company, through account officer Jerry Drake, sent two pages of correspondence to July Oyler inaccurately introducing The Cadle Company as the new owner of "your loan from First Select, Inc.". The first page is a letter that sets forth the principal balance owing, the account number, a manner in which the recipient can take advantage of an automatic withdrawal payment system and asks if any proceedings in bankruptcy have been instituted. It goes on to inform Ms. Oyer of the fact that the balance set forth earlier in the letter "does not include any unpaid interest, late charges, negative escrow, etc., that may be due" and instructs her to call the author for a "pay-off figure". In addition it directs her attention to the second page of correspondence which it refers to as a notice provided in compliance with the FDCPA.

The notice page includes a statement that "the purpose of this letter is to collect a debt" and that the notice is being provided in accordance with 15 U.S.C. 1692e(11). It provides the required notification that the recipient may dispute the validity of the debt within thirty days of receipt of the notice.

It also reiterates that the balance provided may not include additional charges and asks that the recipient confirm or dispute the principal balance by completing a form at the bottom of the page. Judy Oyler filed the initial complaint in this cause in June of 2001. On March 4, 2002 Edward Dechart as Trustee of Ms. Oyer's bankruptcy estate was substituted as the plaintiff in interest.

STANDARD OF REVIEW

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The mere existence of a factual dispute will not bar summary judgment; the facts in dispute must be outcome-determinative. *Id.* In considering a motion for summary judgment, a court must review the record and draw all reasonable inferences in the light most favorable to the non-moving party. *Id.* at 255; *Del Raso v. United States*, 244 F.3d 567, 570 (7th Cir. 2001). "[A] party will be successful in opposing summary judgment only when they present definite, competent evidence to rebut the motion." *Smith v. Severn*, 129 F.3d 419, 427 (7th Cir. 1997).

Appendix C

FDCPA STANDARDS

The FDCPA seeks to eliminate abusive debt collection practices and to protect consumers against debt collection abuses. 15 U.S.C. § 1692(e). The Seventh Circuit evaluates alleged violations of the FDCPA by viewing a debt collectors conduct through the eyes of the unsophisticated consumer. See *Avila v. Rubin*, 84 F.3d 222, 226 (7th Cir. 1996) (rejecting the least sophisticated consumer standard). The Seventh Circuit has further recognized that the unsophisticated consumer standard protects the consumer who is uninformed, naive, or trusting, yet it admits an objective element of reasonableness. The reasonableness element in turn shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters. *Gammon v. GC Services Limited Partnership*, 27 F.3d 1254, 1257 (7th Cir. 1994).

THE MILLER CASE

The Trustee correctly points to the case of *Miller v. McCalla, Raymer, Padrick, Cobb Nichols & Clark, LLC*, 214 F.3d 872 (7th Cir. 2000) as the leading precedent in this circuit with regard to the issue of what constitutes a debt collector's compliance with the FDCPA requirement in 15 U.S.C. § 1692g(a), that a consumer be provided with a written notice containing "the amount of the debt". In *Miller* the debt collector sent a letter to the plaintiff stating that the unpaid principal balance of the loan was $178,844.65. The letter further provided that this amount did not include

accrued but unpaid interest, unpaid late charges, escrow advances or other charges for preservation and protection of the lenders interest in the property, as authorized by the loan agreement. It went on to state that the amount to reinstate or pay off the loan changed daily and the recipient could call the office for complete reinstatement and payoff figures. *Id.* at 875. Finally, the letter provided a toll-free number the debtor could call. *Id.* In finding that the letter violated the FDCPA, Judge Posner wrote for the Court:

> The statement does not comply with the Act (again we can find no case on the question). The unpaid principal balance is not the debt; it is only a part of the debt; the Act requires statement of the debt. . . . What would or might be impossible for the defendants to do would be to determine what the amount of the debt might be at some future date if for example the interest rate in the loan agreement was variable. What they certainly could do was to state the total amount due interest and other charges as well as principal on the date the dunning letter was sent. We think the statute required this.

Id. at 875-876.

The language used by defendant in drafting the letter at issue in our case is nearly identical to the language at issue in the *Miller* matter. Consequently, with respect to the issue of its failure to identify the total amount of the debt due and

owing, the letter violates the FDCPA.[2] Unless any of the other defenses asserted by The Cadle Company have merit, the letter is in violation of the FDCPA.

A DEBT COLLECTOR UNDER THE FDCPA

The Cadle Company asserts that the letter was not in violation of the FDCPA because it was not sent in an attempt to collect a debt. Defendant argues that nowhere in the letter is there language asserting that the debt was due or requesting that it be paid. According to defendant, it was an introductory informational letter. In essence, The Cadle Company argues that it was not acting as a debt collector under the Act.

It is undisputed that an affiliate, not The Cadle Company, owned the debt. The second page of the correspondence specifically states that "the purpose of this letter is to collect a debt". This simply can not be ignored. Defendant meets the definition of "debt collector" contained in 15 U.S.C. § 1692a, and the letter is "communication" as that term is defined. This defense has no merit.

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2. As noted, plaintiff is also claiming that the communication violated the FDCPA because the second page inappropriately "demanded" information from the consumer and at a minimum was confusing and made it appear as though the consumer had some obligation to provide information in order to challenge the validity of the debt. We do not read the letter in that fashion, but need not reach a conclusion with regard to this issue, having found the letter otherwise in violation of the Act.

Appendix C

CONSUMER DEBT

Next the defendant argues that there is a factual question regarding whether or not the debt is a "consumer debt". It is undisputed that the account at issue was a delinquent credit card account purchased by an affiliate of The Cadle Company. However, defendant attempts to raise a question as to whether or not a particular cash advance transaction entered into with the credit card was used for "personal, family, or household purposes," as required for the Act to apply.

The attempt to raise this as a material factual issue similarly fails. The Cadle Company relies on pure, inadmissable speculation contained in the affidavit of Daniel Cadle. On its face the account is a consumer debt. Defendant may not attempt to overcome this fact, or bring it into question in order to avoid summary judgment on the basis of mere supposition or speculation. *Albiero v. City of Kankakee*, 246 F.3d 927, 944 (7th Cir. 2001).

BONA FIDE ERROR

Finally, The Cadle Company attempts to avoid liability for the violation, by asserting the bona fide error defense. It claims that it had procedures in place to comply with the FDCPA and had no intent to violate the Act. The relevant provision in the Act states, "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide

error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c).

In the affidavit of Daniel Cadle, defendant offers testimony, in the most general of terms, to the effect that employees of The Cadle Company are provided verbal training on the requirements of the FDCPA and periodic reviews of form letters are completed to assure compliance. The defendant portrays this verbal training and periodic review as policies and procedures in place and asserts that despite these polices and procedures an error occurred. However, this defense does not shield those who simply misunderstand the obligations imposed by the FDCPA. *Clark v. Priority Financial Services, Inc.*, 2001 WL 1155152 (S.D. Ind. September 8, 2001); *Bawa v. Bowman, Heintz, Boscia & Vician*, 2001 WL 618966, at *4 (S.D.Ind. May 30, 2001).

Further, the defendant offers no evidence of what the error was in this case and how the policies and procedures in place were designed to address such a potential error. Its assertions are much more broad and ambiguous in nature. The Cadle Company is merely asserting, in general, that it attempts to make sure it is in compliance with the FDCPA. However, the dunning letter was not in compliance because it did not provide the total amount of the debt. This is not an error such as a transposition of numbers, or failure to record a payment made. More directly stated, defendant's suggestion that by keeping an eye on collection law, as it develops or changes, it has instituted the type of policies or procedures necessary to demonstrate a lack of intent to violate the law

and has shielded itself from liability under the Act just doesn't wash. The letter at issue was sent more than three months after the *Miller* decision was decided. Apparently the periodic compliance review referred to within the submitted affidavit was not periodic enough.

In addition, the Court agrees with plaintiff when he points out that defendant's broad assertion that it tries to comply with the applicable law can not serve as the type of policies and procedures contemplated by Congress as sufficient to insulate a debt collector from liability. Otherwise, nearly all violations could be claimed to fall within the protection of the bona fide error defense by any offending debt collector.

CONCLUSION

Plaintiff is entitled to summary judgment against defendant with respect to its liability for failing to comply with the FDCPA in its September 18, 2000 communication to Ms. Oyler and, accordingly, the Court GRANTS Plaintiff's Motion For Summary Judgment.

The amount of damages to which plaintiff is entitled remains an unanswered issue. No actual damages have been pled. Because this matter is not a certified class action, plaintiff is limited to recovering statutory damages in an amount not to exceed $1,000.00 as well as costs and a reasonable attorneys fee. 15 U.S.C. § 1692k requires the court to examine the frequency and persistence of noncompliance, the nature and extent of noncompliance, as well as the intent of the defendant when it establishes the amount of liability.

Appendix C

The record currently before the court is insufficient with regard to these issues for it to determine the amount of damages to assess. A status conference is currently set before Magistrate Judge Godich on September 17, 2003. In addition to potential settlement, that conference should include a discussion of the manner in which the parties will seek to muster evidence with respect to the remaining damage issues.

IT IS SO ORDERED THIS 11th day of September, 2003.

s/ Sarah Evans Barker
SARAH EVANS BARKER, JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED MAY 1, 2006

United States Court of Appeals
For The Seventh Circuit
Chicago, Illinois 60604

May 1, 2006

Before

Hon. WILLIAM J.BAUER, *Circuit Judge*

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

Nos. 04-4213, 05-1359

EDWARD P. DECHERT, as trustee of the estate in bankruptcy of Judy A. Oyler,

Plaintiff-Appellee,

v.

CADLE COMPANY,

Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

Appendix D

No. 1P01-0880-C-B/G

Sarah Evans Barker, *Judge.*

ORDER

On March 30, 2006, plaintiff-appellee filed a petition for rehearing with suggestion for rehearing *en banc.* All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc.* The petition is therefore DENIED.

APPENDIX E — STATUTE INVOLVED

Fair Debt Collection Practices Act, 15 U.S.C. § 1692

§ 1692k. Civil liability

(a) **Amount of damages**—Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of such failure;

(2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or

(B) in the case of a class action, . . . ; and

* * *

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court. On a finding by the court that an action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

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